IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CONFIRMATION CASE No.6 of 2004
With
CRIMINAL APPEAL No.1497 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B. ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant

Versus

BAHADURBHAI LAKHABHAI VANK & ANR. - Respondents

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Appearance :
MR ND GOHIL APP for Appellant-State.
MR ND NANAVATI, Sr.Advocate with MR Hriday C BUCH, for Respondents-Convicts.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 29th,30th Sept. & 3rd Oct.,2005

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Confirmation Case No.6 of 2004 arises pursuant to submission of the proceedings of Sessions Case No.7 of 2002 made under Section 366(1) of the Code of Criminal

Procedure, 1973 [`Code' for short] by the learned Sessions Judge, Amreli, who by his judgment dated July 27, 2004 has sentenced respondent No.1 i.e. Bahadurbhai Lakhabhai Vank and respondent No.2 i.e. Dilubhai Hadabhai Vank to death for commission of offence punishable under Section 302 r.w.Section 120B of the Indian Penal Code [`I.P.C.' for short], whereas Criminal Appeal No.1497 of 2004 filed under Section 374(2) of the Code is also directed against the same judgment by which out of three appellants, appellant Nos.1 & 3 are sentenced to death, for commission of offence punishable under Section 302 r.w.section 120B I.P.C., whereas appellant No.2 is sentenced to R.I. for life, for commission of offence punishable under Section 302 r.w.section 120B I.P.C., and the appellant No.3 is convicted under Sections 324 and 332 I.P.C., whereas the appellant Nos.1 & 2 are convicted under Sections 324 & 332 r.w. Section 120B I.P.C. and all appellants are convicted under Section 135 of the Bombay Police Act, 1951 and each sentenced to R.I. for one year and fine of Rs.10,000/-, in default, S.I. for one month, for commission of offence punishable under Section 324 r.w.Section 120B I.P.C. as well as R.I. for one year and fine of Rs. 10,000/-, in default, S.I. for two months, for commission of offence punishable under Section 332

r.w. Section 120B I.P.C. No separate sentence is imposed on any of the appellants for commission of offence punishable under Section 135 of the Bombay Police Act. The learned Judge has further directed that each of appellant Nos.1 & 3 shall make payment of Rs.3 lakhs, whereas appellant No.2 shall make payment of Rs.2 lakhs as compensation to the wife of deceased Taiyabbhai under Section 357 of the Code.

2. The facts emerging from the record of the case are as under :

Deceased Taiyabbhai Umarbhai was resident of village Vadiya. He was married to Liliben @ Hamina. During the course of subsistence of her marriage, Liliben gave birth to five children. Deceased Taiyabbhai was involved in case of murder of one Bhupatbhai Virabhai and was required to be produced before the learned Judicial Magistrate, First Class, Vadiya as required by Section 167 of the Code. The incident in question took place on September 13, 2001. On the day of incident, the deceased was produced in the Court of learned J.M.F.C., Vadiya from Amreli Jail by two constables i.e. Husenbhai Abdullabhai and Bhupatbhai Ratilal. It may be stated

that Liliben, who is wife of the deceased, was earlier residing at village Vadiya, but, after her husband was removed to Amreli Jail, she was residing at Junagadh. When deceased Taiyabbhai was in Amreli Jail, his mother had gone to Amreli Jail to see him and mother of deceased Taiyabbhai had informed her daughter-in-law Liliben that the deceased was going to be produced in the Court of learned J.M.F.C.Vadiya on September 13, 2001. Therefore, in order to meet her husband, Ms.Liliben had come form Junagadh to Vadiya. So also, father of deceased Taiyabbhai and his uncle had also gone to Vadiya Court to meet the deceased. After production of the deceased in the Court, he was being taken back to Amreli Jail by two police constables, whereas his relatives i.e. his wife, father etc. were following him. When the police officials reached near Bus-Stand along with the deceased, appellant No.1-Bahadurbhai Lakha and appellant No.3-Dilubhai Hadabhai came from lane of Guest House. They threw chilli powder in the eyes of police officials and the deceased. Thereafter appellant No.1 inflicted knife blows on different parts of body of the deceased, whereas appellant No.3 caused injury to the deceased by means of a knife. An attempt was made by two police constables as well as Liliben, who is wife of the deceased, Umarbhai,

who is father of the deceased and Lakhabhai, who is uncle of the deceased to rescue the deceased. In the attempt to save the deceased, they also received injuries. It may be stated that at the time of incident, appellant No.2 was driving rickshaw and had kept machine of the rickshaw on, and after causing fatal injuries to the deceased, appellant Nos.1 & 3 fled in the rickshaw which was driven by appellant No.2. The injured was removed to hospital, where the Medical Officer on duty declared him as `brought dead'. Thereupon, Ms.Liliben, who is wife of the deceased, lodged complaint with Police Sub Inspector, Vadiya Police Station. The complaint of Ms.Liliben was investigated by P.S.I. Mr.M.P.Bhojani. The investigating officer held inquest on the dead body of the deceased and seized incriminating articles, such as chilli power, plastic chappals etc. He made arrangement for sending the dead body of the deceased to hospital for post-mortem examination. Autopsy on the dead body of the deceased was performed by Dr.Iftehar Haroon Hasan. The investigating officer also recorded statements of those persons, who were found to be conversant with the facts of the case. The appellant Nos.1 & 2 were arrested on September 28, 2001, whereas the appellant No.3 was arrested on October 16, 2001. After arrest of the appellants, a yadi was

forwarded by investigating officer to the Executive Magistrate to hold identification parade. Accordingly, identification parade was held on November 20, 2001. At the identification parade, the appellants were identified by Ms.Liliben, Umarbhai, who is father of the deceased, two police constables etc. While in custody, the appellant Nos.1 & 3 made disclosure statements, pursuant to which weapons used by them in commission of the offences were discovered. Incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory [`F.S.L.' for short] for analysis. On completion of investigation, the appellants were chargesheeted in the court of learned J.M.F.C. Vadiya, for commission of offences punishable under Sections 302, 324, 332 r.w. Section 120B I.P.C. and Section 135 of the Bombay Police Act.

3. As offence punishable under Section 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Amreli, for trial, where it was number as Sessions Case No.7 of 2002. The learned Additional Sessions Judge, Amreli, to whom the case was made over for trial, framed charge against the appellants at Exh.1 for commission of offences punishable under

Sections 120B, 332 r.w. Section 114, 324 r.w. Section 114, 302 r.w. Section 114 I.P.C. and Section 135 of the Bombay Police Act. The accused No.3 was also charged for commission of offence punishable under Section 303 I.P.C., as it transpired during the course of investigation that earlier he was sentenced to R.I. for 20 years and had committed murder of deceased Taiyabbhai while on furlough leave. The charge was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. At the beginning of the trial, the original accused No.2, i.e. Umedbhai Vala, submitted an application on January 1, 2003 claiming that he was juvenile and after producing his birth certificate, prayed the Court to refer his case to Juvenile Board constituted under the Juvenile Justice (Care & Protection of Children) Act, 2000. The learned Judge directed an inquiry to be made. The inquiry revealed that certificate produced by the accused No.2 indicating that his date of birth was December 31, 1985 purportedly issued by Gram Panchyat Vadiya was bogus. Therefore, the learned Additional Public Prosecutor submitted an application at Exh.21 on March 5, 2003 to prosecute officers of Gram Panchayat, who had issued bogus birth certificate of the accused No.2. The learned Judge

allowed the said application vide order dated March 5, 2003 and thereafter, plea that he was juvenile was never raised by the accused No.2. The original accused No.3, i.e. Dilu Hada, submitted an application at Exh.19 stating that Section 303 IPC has been declared to be unconstitutional by the Supreme Court in **Mithu vs. State of Punjab, (1983) 2 SCC 277** and prayed the Court to delete charge under Section 303 IPC framed against him. That application was probably allowed by the learned Judge. In order to delay trial against them, the accused also submitted an application at Exh.28 on May 3, 2003 stating that it was proposed by them to move the High Court to transfer trial to another Sessions Court as they were apprehending danger to their lives. No order could be obtained by them from the High Court and, therefore, trial against them proceeded further.

4. The prosecution, thereafter, examined (1) Ms.Liliben @ Hamina Taiyabbhai as PW.1 at Exh.37, (2) Head Constable Husenbhai Abdulabhai as PW.2 at Exh.42, (3) Head Constable Bhupatbhai Ratilal as PW.3 at Exh.44, (4) Lakhabhai Gigabhai at PW.4 at Exh.49, (5) Umarbhai Gigabhai as PW.5 at Exh.50, (6) panch Jivanbhai Bachubhai as PW.6 at Exh.51, (7) panch Maheshbhai Ranchhodbhai as

PW.7 at Exh.53, (8) panch Bhupatbhai Karshanbhai as PW.8 at Exh.54, (9) panch Mahebubbhai Salambhai as PW.9 at Exh.56, (10) panch Harunbhai Alarakhabhai as PW.10 at Exh.57, (11) panch Rajesh Valakubhai as PW.11 at Exh.60, (12) Dr.Iftehar Haroonbhai Hasan as PW.12 at Exh.61, (13)panch Bharatbhai Haribhai Parikh as PW.13 at Exh.76, (14)panch Vilas Chhaganbhai as PW.14 at Exh.78, (15) panch Dilipbhai Prabhudas as PW.15 at Exh.80, (16) panch Dhirubhai Savabhai as PW.16 at Exh.82, (17) panch Rajeshbhai Batukbhai as PW.17 at Exh.85, (18) panch Bachubhai Naranbhai as PW.18 at Exh.87, (19) panch Baghabhai Gobarbhai as PW.19 at Exh.89, (20) panch Dineshbhai Ranchhodbhai as PW.20 at Exh.90, (21) panch Ravjibhai Bhalabhai as PW.21 at Exh.92, (22) panch Maganlal Kalyanji as PW.22 at Exh.94, (23)eye witness Salimbhai Husainbhai as PW.23 at Exh.95; (24) panch Pathubhai Devabhai as PW.24 at Exh.98, (25) panch Ratibhai Devabhai Chauhan as PW.25 at Exh.99, (26) panch Husenbhai Daudbhai Gadhai as PW.26 at Exh.100, (27) Executive Magistrate Ms.Kalpanaben Kantilal Padiya as PW.27 at Exh.103, (28) Head Constable Mukeshbhai Balvantrai Jani as PW.28 at Exh.107, (29) police constable Rajdevsinh Maisursinh as PW.29 at Exh.109, (30) Shaileshbhai Premjibhai as PW.30 at Exh.110, (31)

Nileshbhai Jesingbhai Parmar as PW.31 at Exh.111, (32) Shashikantbhai Vajubhai as PW.32 at Exh.112, (33) Rahematben Umarbhai as PW.33 at Exh.113, (34) Bhursing Dalpatsing as PW.34 at Exh.114, (35) Rameshbhai Pidiyabhai Patel as PW.35 at Exh.116 (36) Ramniklal Meghjibhai Vanja as PW.36 at Exh.119, (37) Jailor Harishchandra Trikamrav Patil as PW.37 at Exh.121, (38) A.S.I. Karshanbhai Alabhai Dayat as PW.38 at Exh.112, (39) Head Constable Rameshbhai Chhaganbhai Solanki as PW.39 at Exh.125, (40) P.S.I. Mr.N.B.Chudasma as PW.40 at Exh.126, (41) P.S.I. Mr.B.G.Bharwad as PW.41 at Exh.129, (42) P.I. Mr.C.R.Vandravala as PW.42 at Exh.131, and (43) P.S.I. Mr.M.P.Bhojani as PW.43 at Exh.134, to prove its case against the appellants. The prosecution also produced documentary evidence, such as inquest report at Exh.52, panchnama of place of incident at Exh.55, panchnama indicating seizure of articles from place of incident by Mr.G.B.Vaghela, Scientific Officer, Amreli, for analysis at Exh.56, panchnama indicating seizure of clothes of the deceased at Exh.59, medical certificate issued by Dr.Hasan indicating injuries sustained by witness Lakhabhai Gigabhai at Exh.62, medical certificate issued by Dr.Hasan indicating injuries sustained by witness Husenbhai Abdullabhai at Exh.63, medical

certificate indicating injuries sustained b Bhupatbhai Ratilal at Exh.64, medical certificate indicating injuries sustained by Umarbhai Gigabhai at Exh.65, post mortem notes of deceased Taiyabbhai at Exh.69, OPD papers relating to witness Husenbhai at Exh.72, OPD papers relating to witness Bhupatbhai at Exh.73, OPD papers relating to witness Umarbhai at Exh.74, OPD papers relating to witness Lakhabhai at Exh.75, panchnama indicating collection of blood of the accused at Exh.77, arrest panchnama of accused no.1 i.e. Bahadurbhai Lakhabhai Vank and seizure of his bloodstained shirt as well as arrest panchnama of accused Umedbhai at Exh.79, panchnama regarding examination of rickshaw bearing registration No.GJ-10T-5384 conducted by Mr.G.B.Vaghela, Scientific Officer, Amreli, at Exh.81, panchnama indicating discovery of knife pursuant to disclosure statement made by accused No.1 i.e. Bahadurbhai at Exh.83, panchnama indicating collection of sample of blood of accused No.3 at Exh.84, panchnama indicating seizure of rickshaw bearing registration No.GJ-10T-5483, which was found in abandoned condition, at Exh.88, arrest panchnama of accused No.3 i.e. Dilubha Hadabhai Kathi and discovery of knife as well as bloodstained scabbard(sheath) at Exh.91, panchnama prepared during

identification of accused by witness Liliben at Exh.93, yadi received by the Executive Magistrate from PSI for holding T.I.Parade at Exh.104, intimation by the Executive Magistrate to PSI that T.I.Parade would be held on November 20, 2001, at Exh.105, panchnama indicating as to what transpired during the T.I.Parade at Exh.106, map of place of incident at Exh.118, notification issued by competent authority under the provisions of Section 37(1) of the Bombay Police Act, 1951 at Exh.120, Call Form filled up by A.S.I. Mr.Dayatar to requisition help of dog-squad at Exh.123, order releasing accused No.3 i.e. Dilubhai on furlough at Exh.127, intimation to D.S.P., Junagadh stating that accused No.3 was absconding at Exh.128, list of articles sent to F.S.L. for analysis at Exh.133, complaint of Liliben @ Amina at Exh.135, report of Mr.Vaghela, Member of Mobile F.S.L., at Exh.138, another report submitted by Mr.Vaghela, Member of Mobile F.S.L., at Exh.139, receipt issued by F.S.L. for having received muddamala for analysis at Exh.141, report of analysis at Exh.142, report of Physiology Department at Exh.143 etc. in support of its case against the appellants.

5. After recording of evidence of prosecution witnesses was over, the learned Judge of the trial Court explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, accused No.1 i.e. Bahadurbhai stated that he had no information about the claim made by Liliben in her testimony that the incident had taken place at about 12.15 noon. It was put to him that all the three accused were identified by witness Liliben and in answer to the said incriminating circumstance, it was stated by him that Liliben was known to them and, therefore, they were falsely identified. Similar statement was made by the accused No.1 with reference to identification of the three appellants by witness Lakhabhai. In his further statement, accused No.1 specifically contended that all the three accused were relatives of deceased Bhupat Vira and, therefore, on suspicion they were falsely implicated in the case. The claim advanced by the accused No.1 in his further statement was adopted by accused Nos.2 & 3 in their further statements and, therefore, detailed reference to the same is avoided. However, no defence evidence was

adduced by any of the appellants. On behalf of the original complainant i.e. Liliben, written arguments were submitted for consideration of the Court at Exh.148, whereas accused filed their written arguments running into 90 pages on July 13, 2004, for consideration of the Court.

6. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Taiyabbhai died a homicidal death. After referring to principle that burden to prove its case is on the prosecution and also principle relating to appreciation of evidence, the learned Judge held that it was proved that when the deceased was being taken back to Amreli, the appellants came in a rickshaw which was driven by original accused No.2, and appellant Nos.1 & 3 after throwing chilli powder in the eyes of the constables and the deceased, inflicted knife blows on him and thereafter fled in the rickshaw driven by original accused No.2. The learned Judge noticed that panch witnesses had turned hostile, but, held that discovery of weapons, used in commission of the offence, made by the accused pursuant to disclosure statements made by them, was proved in view of reliable testimony of police

officers. The learned Judge also noticed the conduct of original accused Nos.1 & 2 in absconding for a long time after they fled from the place of incident. The learned Judge found that articles belonging to the accused were bloodstained. In ultimate analysis, the learned Judge enumerated facts proved in Para-65 of the impugned judgment and convicted the appellants under Sections 302, 324, 332 r.w. Section 120B I.P.C. Thereafter the appellants were heard on the question of sentences to be imposed on them for commission of abovereferredto offences. The learned Judge has convicted the original accused No.3 under Sections 302, 324, 332 r.w. section 120B I.P.C. as well as Section 135 of the Bombay Police Act, and imposed sentences referred to earlier by judgment dated July 27, 2004 giving rise to above-numbered Confirmation Case and the appeal filed by the accused.

7. Mr.N.D.Nanavati, learned Senior Advocate of the appellants, contended that none of the appellants was related to deceased Bhupatbhai Virabhai with reference to whose murder, deceased Taiyabbhai was arrested, but, due to animosity, the appellants, who belonged to Kathi community, have been falsely implicated in the case and,

therefore, the judgment impugned should be set aside. After referring to the testimony of complainant Liliben, it was argued that she is an interested witness being wife of the deceased and as her claim that she had gone to Court with her daughter Asthana becomes doubtful, her testimony could not have been believed for fastening criminal liability on the appellants. According to the learned counsel of the appellants, the fact that Liliben was accompanied by her daughter Asthana is not stated in her complaint, nor police statement of Asthana was recorded, whereas the investigating officer has accepted the position that the incident had taken place on a thorough-fare where shops are also situated and as no independent witnesses have been examined, interested version of witness Liliben should be disbelieved by the Court. It was argued that neither the statements of shop-keepers, whose shops are situated near the place of incident were recorded, nor were they examined and, therefore, it would not be prudent to accept interested version of witness Liliben, who is wife of the deceased. The learned counsel maintained that according to Liliben, accused No.1 tried to assault the deceased at Bagasara Court also, but, she had to admit that she had not lodged complaint about the same and as the witness has tendency

to make material improvement, her testimony should be disbelieved. It was pointed out to the Court that according to her testimony, her father-in-law and brother of her father-in-law were also present at the police station and were dictating complaint, as she had mentally broken down, which means that tutored version of incident was narrated in the complaint and, therefore, her testimony should be disbelieved. The learned counsel argued that witness Liliben has stated in her testimony that no attempt was made by any one to apprehend the accused by chasing them, whereas the evidence tendered by other witnesses indicates that the accused were, in fact, chased and as her testimony does not get corroboration in material particulars, her testimony should be disbelieved. While commenting on the testimony tendered by witness Husenbhai Abdullabhai, it was argued that according to him, assailants had run away towards small lane leading to Circuit-House, but, his evidence indicates that he and constable Bhupatbhai Ratilal had chased assailants in a different direction and, therefore, his testimony should not be taken into consideration while considering the case of the prosecution against the appellants. According to the learned counsel of the appellants, testimony of witness

Husenbhai makes it very evident that assailants were unknown to him and he was declared hostile by the prosecution, as a result of which his testimony is of little assistance to the prosecution. The learned counsel also pointed out that though it was claimed by this witness that he was escorting the deceased to Bus-Stand and at that time, the deceased was assaulted by the appellants, clothes of this witness had not become bloodstained, whereas his claim was that the stick used by him to ward off the blows on the deceased had become bloodstained, but, it is an admitted position that the said stick was not seized and, therefore, witness Husenbhai should be disbelieved by the Court. The learned counsel argued that the testimony of witness Bhupatbhai Ratilal shows that both the accused had assaulted the deceased and he says that clothes of police constable Husenbhai were bloodstained, which is quite contrary to the claim advanced by Husenbhai in his testimony recorded before the Court and, therefore, his testimony is also unreliable. According to the learned counsel of the appellants, medical evidence on record clinchingly establishes that the deceased had sustained 7 injuries on his person, but, witness Bhupatbhai Ratilal has stated in her evidence that 20 injuries were caused to the deceased

and in view of tendency on the part of this witness to make exaggerations, his testimony should be discarded from consideration. What was pointed out to the Court was that according to witness Bhupatbhai, he in the company of police constable Husenbhai and relatives of the deceased had chased the accused, but, witness Liliben has stated that none had chased the accused, and as testimony of witness Bhupatbhai does not get corroboration from other evidence on record, he should not have been relied upon by the learned Judge of the trial Court. As far as evidence tendered by Lakhabhai Gigabhai, who is uncle of the deceased, is concerned, it was argued that according to him, 20 successive blows were given by the assailants to the deceased, which is nothing-else, but, sheer exaggeration in view of medical evidence on record, and as this witness is not supported by independent or medical evidence, he could not have been believed by the learned Judge of the trial Court. Mr. N.D.Nanavati, learned counsel pointed out to the Court that according to this witness, assailants had fled in the rickshaw which means that they were not chased at all and in view of conflicting evidence led by the prosecution, the appellant should be granted benefit of doubt arising from the facts of the case. Referring to the testimony of

witness Umarbhai, it was argued that according to this witness, accused No.1- Bahadurbhai was with a person, who was unknown to him, but, his presence at the place of incident becomes doubtful in view of testimony of witness Salim, who has stated that he had informed Umarbhai about the incident and, therefore, witness Umarbhai, who is father of the deceased, should be disbelieved by the Court. It was argued that facts have been exaggerated by witness Salim and as he is not corroborated by other independent evidence on record, it would be hazardous to place reliance on his testimony. The learned counsel pointed out to the Court that after the incident, which took place on September 13, 2001, original accused Nos.1 & 2 were arrested on September 28, 2001, whereas original accused no.3 was arrested on October 16, 2001, and a yadi was dispatched by PSI to Executive Magistrate on November 6, 2001 to hold T.I.Parade, after which T.I.Parade was conducted on November 20, 2001, and in view of unreasonable delay in holding T.I.Parade, evidence of identification of the appellants by the witness at T.I. Parade should be disbelieved by the Court. It was argued that accused No.3 was brought to the Office of Mamlatdar tied with a rope, which is quite evident from the testimony of witness Lakhabhai examined at Exh.49 and,

therefore, identification of the said accused by Lakhabhai could not have been relied upon by the learned Judge of the trial Court. According to the learned counsel of the appellants, evidence adduced by the prosecution does not clinchingly establish involvement of original accused No.2 in the incident at all and, therefore, benefit of doubt should be accorded to him. The learned counsel of the appellants asserted that the evidence on record is not appreciated by the learned Judge of the trial Court in its true perspective and, therefore, the appeal filed by the appellant should be accepted. In the alternative, it was argued that the case on hand does not fall within the category of `rarest of rare' as laid down by the Supreme Court in catena of decisions and, therefore, death sentence imposed on the original accused Nos1 & 3 should be commuted into one punishable with imprisonment for life. It was also argued that direction given by the learned Judge to the appellants to pay compensation of huge amount is beyond their financial means and, therefore, the same should be reduced to Rs.1 Lac each. In support of the submissions advanced at the Bar, the learned counsel of the appellants has placed reliance on the decisions in **(1) Kirshna v. State of Haryana, AIR 1997 SC 2598, and (2)**

Vashram Narshibhai Rajapara v. State of Gujarat, 2002(4) GLR 2813.

8. Mr.N.D.Gohil, learned A.P.P. for the State, argued that witness Liliben is wife of deceased Taiyabbhai and, therefore, would not allow the real culprits to go scot free, or involve the appellants falsely in such a serious case and as it is not suggested to her that she was on inimical terms with any of the appellants, her testimony should be accepted by the Court. The learned counsel argued that minor contradictions which appear from the testimony of witness Liliben, on the contrary, indicates that she is not a tutored witness and, therefore, her claim should be accepted by the Court as is accepted by the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses. The learned counsel of the State Government contended that merely because it is not stated by her in her complaint that she was accompanied by her daughter Asthana, or police statement of Asthana was not recorded by investigating officer, one need not jump to the conclusion that narration of incident made by witness Liliben is false. It was contended that non-examination of shop-keepers and/or other independent witnesses, does not affect the prosecution case at all

when it stands firmly unfolded and established by the testimony of witness Liliben as well as other witnesses, and it is wrong to argue that non-examination of independent witnesses makes testimony of witness Liliben doubtful. The learned A.P.P. for the State argued that on the basis of testimony of Salim, which according to the learned advocate of the appellants excludes presence of father-in-law of witness Liliben, witness Liliben cannot be disbelieved when it is asserted by her that her father-in-law was also present at the time of incident, more particularly when the father-in-law of this witness has also asserted that he was present at the place of incident and had sustained injuries in an attempt to save his son. According to the learned counsel of the State Government, as witness Liliben had lost her husband, she was bound to be mentally upset and, therefore, help rendered by her father-in-law, or brother of her father-in-law in dictating complaint cannot be termed as tutoring at all and, therefore, F.I.R. lodged by witness Liliben should not be discarded from consideration on the ground that it reflects tutored version of incident in question. It was maintained before the Court that observing capacity of witnesses would be different when a systematic attempt is launched by the assailants and,

therefore, omission on the part of witness Liliben in stating that two constables had chased the accused to apprehend them would not render her testimony unreliable. The learned counsel argued that though witness Liliben has been cross-examined at length and in great detail, nothing substantial could be elicited so as to impeach her credibility. According to the learned A.P.P., the so-called improvements made by witness Liliben are minor as well as inconsequential in nature and do not affect her veracity at all and, therefore, the learned Judge of the trial Court was justified in acting upon her testimony while deciding guilt of the appellants. The learned counsel of the State further argued that two police constables have rendered consistent account of the incident in question and simply because constable Husenbhai Abdullabhai has stated that his clothes were not bloodstained, whereas police constable Bhupatbhai Ratilal states that clothes of Husenbhai were bloodstained, that fact by itself would not indicate that they were not eye witnesses to the incident. The learned counsel of the State Government emphasised that there is no manner of doubt that accused Nos.1 & 3 had assaulted the deceased with knives in their hands and caused injuries indiscriminately, as a result of which,

statement made by police constable Bhupatbhai that about 20 injuries were caused to the deceased should not be treated as exaggeration on his part, nor the said statement would indicate that he is not a witness of truth. According to the learned A.P.P. for the State, the assertion made by two police constables that after the incident was over, they had chased the appellants, deserves acceptance and this assertion cannot be disbelieved on the ground that witness Liliben has not stated that the accused were chased by any one, because it is but-natural that police constables, in whose presence the incident had taken place, would try to apprehend the assailants. The learned counsel further argued that similarly the testimony of witness Lakha Giga, which completely establishes complicity of three appellants in the incident, deserves acceptance by this Court, and merely because he has also stated that 20 successive blows were given to the deceased, that fact by itself would not make his evidence untrustworthy or unreliable. According to the learned counsel of the State Government, evidence of Umarbhai, who is father of the deceased, also establishes that appellant No.1 i.e. Bahadurbhai with another, who was unknown, had assaulted his son fatally and that on the basis of testimony

rendered by witness Salim, the Court need not come to the conclusion that presence of witness Umarbhai at the place of incident is doubtful, because witness Umarbhai himself was injured in the incident and he is corroborated by medical evidence on record regarding his own injuries. The learned counsel further argued that even testimony of witness Salim also establishes the case of the prosecution against the appellants and, therefore, finding recorded by the learned Judge of the trial Court that involvement of the appellants in the incident in question is firmly established, cannot be regarded as erroneous. What was maintained before the Court was that witness Salim, whose testimony is recorded at Exh.95, establishes beyond reasonable doubt that appellant Nos.1 & 3 had assaulted the deceased with knives and that after the incident was over, they had fled in the rickshaw driven by original accused No.2 and as case of the prosecution stands fully established by the testimony of this witness, no benefit of doubt should be given to original accused No.2 as pleaded by his learned counsel. It was contended that though some delay had taken place in holding T.I.Parade, all precautions, which are necessary to be taken, were, in fact, taken before holding T.I.Parade and none of the witnesses had any

opportunity of seeing any of the appellants till T.I.Parade, and as the appellants were correctly identified by the witnesses, their involvement in the incident stands firmly established by the prosecution. According to the learned A.P.P., it is also established that the appellant Nos.1 & 3 had thrown chilli powder in the eyes of police constables, who were discharging their duties and taking back the deceased to Amreli after attending the Court at Vadiya and, therefore, conviction of the appellants under Section 332 I.P.C. cannot be regarded as erroneous. It was argued that as many as four witnesses were injured by the appellant Nos.1 & 3 when attempt was made by them to save the deceased, and as their evidence gets corroboration from medical evidence on record, conviction of the appellants under Section 324 I.P.C. also cannot be regarded as erroneous. The learned counsel of the appellants stressed that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the appellants under Sections 302, 324, 332 r.w.section 120B I.P.C. as well as Section 135 of the Bombay Police Act, and as the learned counsel of the appellants has failed to dislodge those weighty reasons, the appeal, which has no merits, should be dismissed. As far as imposition of death

sentence on the original accused Nos.1 & 3 is concerned, it was pleaded that not only accused Nos.1 & 3 had hatched a conspiracy to kill the deceased, but, had executed conspiracy in a most brutal manner, in a daring manner that too in presence of police officials and, therefore, death sentence imposed on them by the learned Judge of the trial Court should be confirmed by this Court. According to the learned A.P.P., facts of the case are such which bring the case within the category of `rarest of rare' and, therefore, this Court should not interfere with judicial discretion exercised by the learned Judge of the trial Court in imposing death sentence on them. It was asserted that undue and uncalled for leniency shown by the Courts in the matter of imposing appropriate and proper sentences, has contributed a lot to rise in crime-graph of the country and, therefore, in order to deter other lawless elements like the appellant Nos.1 and 3, death sentence imposed on them should be upheld by this Court. The learned A.P.P. argued that in any view of the matter, death sentence imposed on original accused No.3 should be confirmed by this Court inasmuch as with reference to another case he was undergoing sentence of R.I. for 20 years and while on furlough, he had committed murder of the deceased.

9. This Court has heard Mr.N.D.Nanavati, learned counsel of the appellants, and Mr.N.D.Gohil, learned counsel of the State Government, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

10. The fact that deceased Taiyabbhai Umarbhai Soda died a homicidal death is not disputed by the learned counsel of the appellants. According to the injured witnesses, appellants No.1 & 3 had inflicted knife blows on the deceased. The injuries sustained by the deceased are noticed in inquest report, which is produced at Exh.52. The testimony of Dr.Iftehar Haroon Hasan, recorded at Exh.61, establishes that on September 13, 2001, he was discharging duties as Medical Officer of Community Health Centre, Vadiya and that on that day, dead body of the deceased was brought before him for post mortem examination. The witness has mentioned that post mortem examination was commenced at 4.40 PM and completed at 6.30 PM. The Medical Officer has enumerated external as well as internal injuries noticed by him while performing autopsy on dead body of the deceased in his

substantive evidence before the Court. After referring to those injuries, the Medical Officer has asserted that haemorrhagic shock and cardio respiratory failure resulting from incised wounds by sharp cutting weapon caused death of the deceased. It is also mentioned by the Medical Officer that injuries sustained by the deceased were sufficient in the ordinary course of nature to cause his death. The Medical Officer stands fully corroborated by contemporary document viz. Post mortem notes prepared and produced by him at Exh.69. In the post mortem notes also, injuries sustained by the deceased are enumerated in detail. It is nobody's case that injuries noticed on the dead body of the deceased were either suicidal or accidental. Under the circumstances, finding recorded by the learned Judge of the trial Court that the deceased died a homicidal death is found to be eminently just and is hereby upheld.

11. Before re-appreciating evidence of witnesses examined in the case, it would be advantageous to refer to criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of witness read as a whole appears to have a ring of truth. Once that impression is

formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters, not touching the core of the case, hyper-technical approach by taking sentence torn out of the context here or there, from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the Appellate Court which had not this benefit, will have to attach due weight to the appreciation of evidence by the trial Court, and unless the reasons are weighty and formidable, it would not be proper to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before

the police are meant to be brief statements and could not take place of evidence in the Court. Small/trivial omissions would not justify a finding by a Court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming, from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. In the deposition of witnesses, there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and the like. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the Court to separate falsehood from truth. In sifting the evidence the Court has to attempt to separate the chaff from the grains in every case. The Court cannot abandon the

attempt on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, the evidence of eye-witnesses examined in this case will have to be appreciated.

11(1) In the light of above-quoted principles, the Court will have to consider the question whether guilt of the appellants is established by the prosecution. In order to decide this question, it would be necessary for the Court to discuss the evidence adduced by eye witnesses. Witness Liliben @ Hamina Taiyabbhai, who is wife of the deceased, is examined as PW.1 at Exh.37. In her testimony before the Court she had stated that the deceased was her husband and that during subsistence of her marriage with the deceased, she has given birth to five children. The witness has stated that her husband was in Amreli Jail with reference to a murder case and was brought to the Court of learned J.M.F.C., Vadiya from Amreli with reference to the said case. According to her, she had learnt the fact that her husband was to be brought to Vadiya Court from her mother-in-law, who had visited the deceased at Amreli Jail. The witness has mentioned that after her husband was involved with

reference to murder of Bhupat Vira, she had left village Vadiya and was residing at Junagadh with her relatives. According to this witness, in order to meet her husband she had gone to Vadiya from Junagadh and at that time, her father-in-law Umar Giga and brother of her father-in-law had also come to the Court at Vadiya to meet the deceased. The witness has stated before the Court that as the case was adjourned, her husband was being taken back to Amreli, and that she had met him at the door of the Court. The witness has mentioned that when her husband was being taken to Bus-Stand to board a bus for Amreli by two constables, she and her father-in-law as well as brother of her father-in-law were following the deceased and at that time, she was also accompanied by her little daughter Asthana. The witness has mentioned that when the deceased reached near Guest-House, the appellant Nos.1 & 3 came out from the lane of the Guest-House and threw chilli powder on police as well as on her husband and thereafter appellant No.1 & 3 caused injuries to her husband by means of knives on back and chest. According to her, at that time, policemen who were escorting her husband, had attempted to ward off blows inflicted by accused No.1 on her husband and, therefore, those police personnel had also received injuries. What is maintained

by the witness before the Court is that her father-in-law and brother of her father-in-law had also attempted to save the deceased, but, they had also received injuries by scabbard. According to her, on receipt of injuries, her husband fell down and died on the spot. It is also mentioned by her that at that time, accused No.2 was standing with machine of rickshaw on, and accused Nos.1 & 3 fled in the said rickshaw. The witness has maintained before the Court that as her husband was involved in murder of Bhupat Vira, accused Nos.1 & 3 assaulted him. During the course of recording of her examination-in-chief, the witness mentioned that she lodged complaint and identified her thumb impression thereon. She produced her complaint at Exh.135. The witness has further stated that she was also called at the Office of Mamlatdar, Vadiya, where she had correctly identified the appellants as assailants of her husband. During the course of recording of her examination-in-chief, she also identified the appellants who were present in the Court.

11(2) In her cross-examination, it is stated by her that earlier she was residing with her husband in Mafatia-para which is on Charania road. According to her, her deceased husband was doing labour work and that no

case was registered against him after she had come to reside with him. The witness has further stated that the incident took place within a fraction of minute. According to her, earlier her husband was also taken to Bagasara Court and there the appellants had attempted to assault him, who were found moving on a motor-cycle, but, she had not lodged any complaint with reference to the said incident because of worry for her little daughters. The witness has stated that she was not remembering whether she had narrated the attempt by the appellants on her husband at Bagasara Court to any one or not. According to her, no attempt was made by any one to chase the appellants. The suggestion made by the defence that she had seen Dilu Hada at the time of incident and thereafter at the time when T.I.Parade was held, and that she had not seen him during the interregnum period at all was accepted by the witness. The witness admitted that it was stated by her in her complaint that her deceased husband was assaulted by Bahadur Lakha and another unknown person. It is also admitted by her that it was not stated by her in her complaint that the accused Nos.1 & 3 had thrown chilli powder in the eyes of her husband. The suggestion made by the defence that it was not stated by her in her complaint that she was accompanied by her

little daughter Asthana when she had gone to see her husband at Vadiya Court was accepted by her. The suggestion made by the defence that she had correctly identified all the accused, because she was knowing all of them before the date of incident, is accepted by her. The suggestion made by the defence that her husband had fallen near *otta* of shop, is also accepted by her. The suggestion made by the defence that the incident had taken place in a fraction of minute and, therefore, she had not seen the unknown person, is emphatically denied by her. In her cross-examination, the witness has asserted that she had all opportunity of seeing the said person. The suggestion made by the defence that the police was trying to know name of unknown assailant and had asked her to give name of the original accused No.3 as assailant and, therefore, she had given name of the accused No.3 as assailant of her husband, is emphatically denied by her. Several other questions were also put to her which were replied by her. However, they are not relevant for the purpose on hand and, therefore, they are not referred to in detail.

11(3) On reappreciation of evidence tendered by this witness, this Court finds that she is wife of the

deceased. From her mother-in-law, she learnt that on the day of incident, her husband was to be produced in the Court at Vadiya with reference to a murder case and, therefore, she had gone to Vadiya Court to meet her husband. Her claim that her father-in-law and brother of her father-in-law had also gone to Vadiya Court to see the deceased inspires confidence, as the same gets complete corroboration from their testimony, which this Court proposes to discuss in detail later on. Presence of this witness at the time and place of incident is referred to by all the injured witnesses. It is relevant to notice that this witness is a rustic witness and, therefore, unfolded the prosecution case in a natural manner, without making noticeable embellishments or improvements. Her testimony cannot be disbelieved because so-called independent witnesses have not been examined by the prosecution in this case. It is well to remember that she is wife of the deceased and, therefore, would not allow the real culprits to go scot free, or involve innocent persons falsely in such a serious case. It is well settled that close relatives would be the best witnesses and would be the last to screen the real culprit/s. Relationship of eye witness with the deceased is no ground for rejecting his/her evidence. It is not

suggested to this witness by any of the appellants that she was on inimical terms with any of them. The suggestion made by the defence is that the police was looking for unknown assailant of the deceased and at the instance of police, she had disclosed name of original accused No.3 as one of the assailants of her husband. However, the defence could not point out to the Court as to why police had asked this witness to name accused No.3 as one of the assailants of her husband. It is not suggested to any of the police officers examined in this case that they had any grudge against the appellant No.3 and, therefore, were out to falsely book him in murder of the deceased. The defence that original accused No.3 was falsely implicated by this witness at the instance of police, has no basis whatsoever. With reference to non-mention of fact in her complaint that she was accompanied by her little daughter Asthana when she had gone to meet her husband at Vadiya Court, this Court finds that omission is of little consequence. Non-mention of said fact in the complaint would not indicate that witness Liliben is not a witness of truth. It is well to remember that before her eyes her husband was done to death in a most brutal manner and, therefore, she must have been completely broken down. In such circumstances,

law does not expect her to mention minutest detail in her complaint as if she were giving deposition in a Court of law. With reference to criticism levelled by the learned counsel of the appellants that independent witnesses have not been examined in this case and interested version of the incident narrated by this witness should be disbelieved because of improvements and/or exaggeration, this Court would like to call to its memory and quote pertinent observations made by the Supreme Court in **State of U.P. v. Anil Singh, AIR 1988 SC 1998,** which are as under:-

> *"In the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being*

disbelieved. But, that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

12. The question of non-examination of witnesses can be viewed in different and pragmatic angle. It is obvious that even if the shop-keepers and other so-called independent witnesses had been examined and deposed in favour of the accused, they would have been confronted with their previous statements made before the police which would have rendered their testimony wholly contradictory and discrepant and no purpose would have been served by examining them.

13. Applying principles laid down in above-quoted decision to the facts of instant case, this Court finds that witness Liliben is a witness of truth. Merely because she has made some improvements and/or added embellishments, her testimony cannot be discarded wholly

as is suggested by the learned counsel of the appellants. On going through her testimony, this Court finds that it has ring of truth. A lady, who witnesses gruesome murder of her husband, is bound to suffer great mental shock and, therefore, when Liliben was assisted by her relatives in dictating complaint, the complaint cannot be branded as tutored version of those who had helped such lady. Further, the record shows that the three appellants had engaged three different counsels to defend them. All the defence counsels had subjected witness Liliben, who is a rustic, to gruelling cross-examination merrily without exhibiting sympathy to her or showing concern about the grave incident in which she had lost her husband. Discrepancies are bound to take place if a witness is cross-examined at great length. Therefore, her testimony cannot be rejected on the ground of discrepancies appearing in her evidence. On the facts and in the circumstances of the case, this Court finds that the testimony of witness Liliben establishes beyond doubt that even before the incident, she was knowing the appellants and was, therefore, able to identify the appellants, though she was not knowing names of appellant Nos.2 & 3. Therefore, the learned Judge of the trial Court was justified in placing reliance on her testimony

for fastening criminal liability on the appellants. As such no good ground is made out by the learned counsel of the appellants to discard her evidence.

14. The next eye witness, whose testimony deserves to be considered is Husenbhai Abdullabhai. The testimony of this witness is recorded at Exh.42. His testimony discloses that at the relevant time he was discharging duties as an Armed Police Constable at Amreli Police Headquarter and one of his duties was to produce prisoners before Court on due date. According to him, on September 12, 2001, he was assigned duty to take the deceased to the Court at Vadiya on September 13, 2001, and he was to be accompanied by Armed Police Constable Bhupatbhai Ratilal. The witness has mentioned that on September 13, 2001, he had reported for duty at Amreli Headquarter where police constable Bhupatbhai Ratigiri was also present. The witness has stated that after securing warrant from Headquarter, he had gone to Amreli Sub-Jail and he in the company of Armed Constable Bhupatbhai Ratigiri had proceeded towards Amreli Bus-Stand with the deceased to reach Vadiya. According to him, after alighting at Vadiya Bus-Stand, the deceased was produced before the competent Court and the deceased was offered meals at Mamlatdar Office. The witness has

stated that thereafter they had proceeded towards Vadiya Bus-Stand, whereas Umarbhai i.e. Father of the deceased and uncle of the deceased as well as wife of the deceased were following them. The witness has asserted that near Circuit-House, two persons with knives had emerged and after throwing chilli powder, they had caused knife blows to the deceased indiscriminately. The witness has stated that he had attempted to ward off blows on the deceased and in the said process, had sustained injury on a finger of his left hand. The witness has stated that the uncle of the deceased as well as father of the deceased and wife of the deceased had also attempted to save the deceased. What is mentioned by the witness is that on receipt of injuries, the deceased had died on the spot, whereas, the assailants had run away towards by-lane of Circuit-House. The witness has mentioned that he had instructed Constable Bhupatbhai Ratilal to inform about the incident at the police station, whereas he had maintained watch over the dead body of the deceased. According to this witness, after sometime, police officials had come, who removed dead body of the deceased to hospital, whereas the injured were referred to hospital for treatment. The witness has mentioned that those who had assaulted the deceased, were unknown persons, but, the father of the deceased had requested

one of them not to assault his son by saying that `Bahadur, please stop'. The witness has further mentioned that he was called at the Office of the Mamlatdar for the purpose of participating in T.I.Parade, and he had identified the three appellants who involved in commission of crime. During the course of recording of his examination-in-chief, the witness was shown two knives, which were recovered during the course of investigation, and after seeing at them, it was testified by him that knife produced as Article No.22 was with Bahadur, whereas knife produced as Article No.26 was with accused Dilu Hada. This constable had failed to narrate the facts which he had stated in his police statement and, therefore, he was permitted to be cross-examined by the learned A.P.P. During cross-examination by the learned A.P.P. it was admitted by him that he had stated in his police statement that after assault on the deceased, two assailants had fled in loading rickshaw, which was kept in by-lane. It was mentioned by the witness that he had not identified the original accused No.2 at the T.I.Parade. In cross-examination by the defence, it was mentioned by the witness that police constable Bhupat Ratilal had also tried to ward off assault on the deceased. It was further stated by him that in order to deter the assailants from mounting

attack on the deceased, he had caused 4 to 5 stick blows on them. The suggestion made by the defence that at the time of incident, Liliben i.e. wife of the deceased, Umarbhai i.e. father of the deceased, Lakhabhai i.e. uncle of the deceased and daughter of deceased Taiyabbhai were present, was accepted by the witness. The suggestion made by the defence that chilli powder was not thrown either on the police officials, or on deceased Taiyabbhai, was emphatically denied by him. The suggestion made by the defence that the deceased had bled profusely, was accepted by the witness. The suggestion made by the defence that he was got up as a witness by the relatives of the deceased and was, therefore, deposing falsely against the accused, was emphatically denied by him. It may be stated that this witness is also cross-examined at length, and perusal of his testimony indicates that he had answered all the questions which were put to him. However, those questions and answers are not relevant for the purpose on hand and, therefore, are not referred to in detail.

14(1) On reappreciation of evidence of this witness, this Court finds that in discharge of his official duty, he had taken the deceased from Amreli Sub-Jail to Vadiya Court, and was returning with him to

Amreli Sub-Jail, and that assault was mounted on the deceased when they had reached near Circuit-House. It is also evident from the testimony of this witness that though the assailants were unknown to him, in view of request made by the father of the deceased he was able to know that name of one of the assailants was Bahadurbhai. The witness had correctly identified all the accused at T.I.Parade. His assertion that in an attempt to save the deceased, he had sustained injury, stands corroborated by medical evidence on record adduced by Dr.Hasan. Dr.Hasan has produced injury certificate of this witness at Exh.63. The presence of this witness at the time and place of the incident is admitted by the defence. Presence of this witness at the time and place of incident is also referred to by the other eye-witness examined in the case. Though the witness has been cross-examined at length and in great detail, nothing could be brought on record to impeach his credibility. The testimony of this witness is quite clear, categorical and implicitly reliable. It is free from any blemish . Therefore, this Court is of the opinion that participation of the three appellants in commission of murder of the deceased is firmly established by reliable testimony of this witness.

15. Another police constable i.e. Bhupatbhai Ratilal, who had accompanied constable Husenbhai Abdullabhai when the deceased was taken to Court at Vadiya, is examined at Exh.44. The witness has mentioned in his testimony before the Court that on September 13, 2001, he in the company of police constable Husenbhai had gone to Sub-Jail, Amreli and from there, they had taken deceased Saiyad with them to Vadiya Court. The witness has asserted that when they were returning, two persons had emerged from by-lane of Circuit-House and had thrown chilli powder on him and his colleague Husen Abdullabhai as well as the deceased and thereafter they had assaulted the deceased with knives. The witness has stated that he had attempted to save the deceased, but, he was threatened with life, and that in the attempt to save the deceased, he had received injury on index finger of his left hand. According to this witness, when they were escorting the deceased back to Bus-stand of Vadiya village, wife of the deceased as well as father of the deceased and his uncle were following the deceased, and they had also attempted to save the deceased. The witness has mentioned that as chilli powder was thrown in his eyes, he had taken treatment at hospital, after which his police statement was recorded. The witness has further mentioned that T.I.Parade was held in the Office of

Mamlatdar and that he had identified two accused including Bahadur Lakha. The witness has claimed that he was able to know that name of one of the assailants was Bahadur, because uncle of the deceased had requested the accused No.1 by name not to beat the deceased further. According to him, he had also identified Dilu at T.I.Parade. During the course of recording of his examination-in-chief, he identified the appellant Nos.1 & 3, who were present in the Court and also the knives which were used by them in commission of crime.

15(1) In his cross-examination by the defence, the witness has stated that a departmental inquiry was instituted against him with reference to incident in question. The suggestion made by the defence that he and constable Husen Abdullabhai had not attended the deceased at all and, therefore, the departmental inquiry was initiated against him, is emphatically denied by him. It was admitted by him that for showing negligence in performance of duty, 4 to 5 increments available to him were withdrawn. The suggestion made by the defence that when the deceased had fallen down, the deceased, who was then injured, alone was attempting to save his life, was accepted by this witness. It was also admitted by the witness that when he had reached near the deceased, the

deceased had already received 7 to 8 knife blows. The suggestion made by the defence that he had accompanied police constable Husenbhai when Husenbhai was chasing the assailants, was accepted by him.

15(2) On re-evaluation of evidence of this witness, the Court finds that this witness is also cross-examined at great length. Though this witness has been cross-examined at length, nothing could be brought on record so as to create doubt about the version of the incident narrated by him in his examination-in-chief. It could not be even remotely suggested to this witness that he was on inimical terms with any of the appellants and was, therefore, out to implicate them falsely in such a serious case. The claim made by the witness that in an attempt to save the deceased, his left hand index finger was injured, gets complete corroboration from the testimony of Dr.Hasan examined at Exh.61 as well as contents of certificate of his injuries produced by the prosecution at Exh.64. The testimony of this witness is also without any blemish and, therefore, it will have to be held that complicity of the appellants in commission of the offence in question stands firmly established by the testimony of this witness.

16. This brings the Court to consider the testimony of witness Lakha Giga, who is uncle of the deceased and whose testimony is recorded at Exh.49. The witness has stated that the deceased was his nephew, whereas injured Umarbhai Gigabhai is his brother, and that complainant Liliben is wife of the deceased. According to this witness, on the day of incident, the deceased was to be produced before Vadiya Court and, therefore, in order to meet him, he in the company of his brother Umarbhai Gigabhai and complainant Liliben had gone to Court premises to meet the deceased. The witness has stated that when the deceased was being taken back to Bus-stand, a rickshaw had come form by-lane and one of the assailants had thrown chilli powder in the eyes of the police constables and the deceased. The witness has asserted that thereafter the deceased was assaulted indiscriminately by two assailants with knives. According to this witness, he and his brother Umarbhai Gigabhai had attempted to save the deceased and in the said process, had received injuries. The witness has mentioned that after causing murder of the deceased, the assailants had fled in the rickshaw. What is claimed by this witness in his examination-in-chief is that the names of the assailants of the deceased were Bahadur Lakha, Umed Gatu and Dilu Hada, and Bahadur Lakha had caused injury to him

also. During the course of recording of examination-in-chief, the witness had identified all the three appellants as well as the knives used by appellant Nos.1 & 3 in commission of crime. According to this witness, as he had received injury, he was treated at Government Hospital, Vadiya and a stitch was required to be taken. The witness has further mentioned that after about one month, he was called at the Office of the Mamlatdar to participate in T.I.Parade and that he had identified the appellant Nos.1 & 2 as well as unknown person, who had accompanied them, as assailants of the deceased.

16(1) In his cross-examination by the defence, the suggestion made by the defence that wife of the deceased had met the deceased when he was being taken back to Vadiya Bus-stand, is emphatically denied by him. According to this witness, he, his brother Umarbhai and Liliben had met the deceased near entrance of Court premises. The suggestion made by the defence that they had waited in the Court for 10 minutes along with police constables, is accepted by him. It was also admitted by him that it was not stated by him in his police statement that from by-lane near old bus-stand,a rickshaw had come from which three persons had alighted. The witness has stated that he was not knowing both the assailants, but

was knowing one of them. It was also admitted by him that when accused Dilu Hada was produced in the Office of Mamlatdar for T.I.Parade, he was tied with rope.

16(2) On reappreciation of evidence of this witness, the Court finds that he has narrated the incident in most natural manner, without making noticeable improvements and/or embellishments. The presence of this witness at the time and place of the incident is referred to by all eye witnesses including the complainant. The fact that he was injured when he had attempted to save the deceased can hardly be disputed. This witness gets complete corroboration from the testimony of Dr.Hasan recorded at Exh.61 as well as contents of certificate of injury produced by he prosecution at Exh.62 regarding his own injuries. As this witness was injured, his presence at the time and place of incident can hardly be disputed. The testimony of this witness also proves beyond pale of doubt that the two appellants i.e. appellant Nos.1 & 3 had assaulted the deceased with their knives and had thereafter fled in the rickshaw which was driven by the appellant No.2.

17. The testimony of witness Umarbhai Gigabhai, who is father of the deceased, is recorded at Exh.50. This

witness has mentioned in his testimony before the Court that the deceased was his son, whereas complainant Liliben @ Hamina is wife of the deceased, and witness Lakhabhai Gigabhai is his brother. The witness has asserted that on September 13, 2001, his deceased son was to be produced before Court at Vadiya and, therefore, he with his brother Lakhabhai and wife of the deceased Liliben had gone to meet the deceased at the Court premises. The witness has stated that after the case was adjourned, the deceased was being taken back to Bus-stand. The witness has mentioned that when the deceased reached near the Rest-House, the appellant No.1 and another person, who was unknown to him, came out of lane of the Rest-House and assaulted the deceased indiscriminately with their knives. What is asserted by the witness is that after mounting assault on the deceased, two assailants fled in the rickshaw, which was kept in running condition near Rest-House. The witness has mentioned that he had made attempt to save his son and in the attempt to save his son, he had received injuries with a knife inflicted by accused Bahadur. According to him, he was taken to Government Dispensary for treatment and that complaint regarding incident in question was lodged by his daughter-in-law. The witness has further stated that he was called at the Office of

the Mamlatdar for identifying the assailants of his son and that out of 15 to 16 persons, he had identified all the accused by catching hold of their respective wrist. During the course of recording of examination-in-chief, the witness was shown knives produced as Article Nos.22 & 26, and after seeing at them, it was asserted that they were the same knives which were used by the accused in commission of crime.

17(1) In his cross-examination, it was mentioned by this witness that about 18 knife blows were inflicted on the deceased. The suggestion made by the defence that the deceased had fallen near the rickshaw, was emphatically denied by him. What is asserted by this witness in his cross-examination is that the assailants had run away in the rickshaw which was standing in by-lane of Circuit-House. The suggestion made by the defence that shop-keepers had collected in circle and were watching assault on the deceased, is emphatically denied by him. The witness has mentioned that he had stayed at the place of incident for about 15 minutes and thereafter he had gone to hospital for treatment. This witness is also cross-examined at length, and several question were put to him, which were answered by him. However, they are not relevant for the purpose on hand and, therefore,

detailed reference to the same is avoided.

17(2) On reappreciation of evidence of witness Umarbhai, it becomes evident that he had gone to see his son, who was produced before Vadiya Court. It is well to remember that he is father of the deceased and, therefore, would not allow the real culprits to go scot free, or involve innocent persons falsely in such a serious case. His presence at the time and place of incident can hardly be doubted, inasmuch as in an attempt to save his son, he had received injuries. Regarding injuries sustained by him, this witness stands corroborated by the testimony of Dr.Hasan recorded at Exh.61 as well as contents of certificate produced by the prosecution at Exh.65. The presence of this witness is also referred to by all the witnesses. In spite of gruelling cross-examination of this witness, nothing could be brought on record to indicate that he was not a witness of truth. A fair reading of testimony of this witness makes it more than clear that he has narrated the incident in most natural manner. Had he been inclined to involve the appellants falsely, at the first opportunity he would have named them, but, such an attempt was never made by him. On the facts and in the circumstances of the case, this Court is of the opinion that the learned Judge

of the trial Court, who had advantage of observing demeanour of the witness, was justified in placing reliance on the testimony of this witness for the purpose of fastening criminal liability on the appellants.

18. This brings the Court to consider the testimony of last eye witness i.e. Salimbhai Husenbhai. The testimony of this witness is recorded at Exh.95. This witness has stated that deceased Taiyabbhai was son of his uncle. According to this witness, on the day of incident, the deceased was brought before Court at Vadiya and that he had seen that the deceased and two police constables had alighted from bus at the Bus-stand to reach Vadiya Court. The witness has mentioned that thereafter he had gone to his house for the purpose of taking meals. According to this witness, at about 12.00 noon, he was passing on road from old bus-stand to new bus-stand and noticed a crowd and, therefore, had gone there. The witness has stated that at that time he had seen that appellant No.1-Bahadur and appellant No.3 Dilu were assaulting deceased Raiyabbhai, whereas appellant No.2 i.e. Umed was raising shouts to finish the deceased as early as possible, as he was apprehending arrival of police. According to this witness, Bahadur was armed with a big knife, whereas the knife which was in the hand of

Dilu was smaller in comparison to the knife which was in the hand of Bahadur. The witness has mentioned that after assaulting the deceased fatally, all the three had run away in the rickshaw. The witness has mentioned that thereafter he had informed his uncle Umarbhai. According to this witness, he was not knowing the reason as to why the appellants had assaulted the deceased.

In his cross-examination, the suggestion made by the defence that he had not seen the incident, but, someone-else had reported the incident to him, is emphatically denied by him. The suggestion made by the defence that he had not seen the appellant Nos.1 & 3 causing injuries to the deceased is also emphatically denied by him. According to this witness, the crowd, which he had noticed, was consisting of 30 to 35 persons. The suggestion made by the defence that he was falsely deposing against the appellants is not accepted by him. In fact, the tenor of cross-examination of this witness unerringly establishes his presence at the time and place of incident in question. It is relevant to notice that all the three appellants were fairly known to him and at the earliest opportunity he had disclosed names of all the three appellants as assailants of his cousin. His testimony further establishes that policemen and

Lakhabhai were also injured in the incident. It could not be even remotely suggested to this witness that he was on inimical terms with any of the appellants and, therefore, was out to involve the appellants falsely in such a serious case. In fact, as all the three appellants were fairly known to him, he was not called upon to participate in T.I.Parade. The testimony of this witness firmly establishes complicity of all these three appellants in murder of the deceased and, therefore, plea that it is not established by the prosecution that the appellants were involved in the incident in question, cannot be accepted.

19. Having noticed eye witness account of the incident in question it would be relevant to refer to evidence adduced by the prosecution regarding T.I.Parade where the appellants were identified by witness Liliben, witness Husenbhai, witness Bhupatbhai, witness Lakhabhai and witness Umarbhai. In order to establish its case that at T.I.Parade all the three appellants were correctly identified by the witnesses, the prosecution has examined Executive Magistrate Ms.Kalpanaben Kantilal Padiya as PW.27 at Exh.103. Her testimony would indicate that she had received a yadi from Vadiya Police Station on November 3, 2001 for holding T.I.Parade and that by an

intimation dated November 6, 2001 she had informed the police officer concerned that T.I.Parade would be held in her Office at 11.00 A.M. on November 20, 2001. The witness has mentioned that on November 20, 2001, she had requisitioned services of two panch witnesses and in presence of panch witnesses, T.I.Parade was held. Her testimony read with the contents of panchnama of T.I.Parade produced by the prosecution at Exh.106 would indicate that ten other persons were also summoned at the time of holding of T.I.Parade and accused No.1 i.e. Bahadurbhai Lakhabhai Vank was made to stand between one Dipakbhai Jilubhai Kahor and Valakubhai Amarabhai Khuman, whereas accused No.2 i.e. Umedbhai Gatubhai was made to stand between Bhikhubhai Apabhai Khuman and Ashokbhai Kathadbhai Vala, and accused No.3 i.e. Dilubhai Hadabhai Vank was made to stand between Kalubhai Govindbhai Sandarva and Bhupatbhai Rajabhai Der. The evidence adduced by the prosecution further establishes that first of all, Liliben was asked to identify the accused, who had correctly identified all the three appellants, after which the appellants were identified by witness Umarbhai Gigabhai, witness Lakhabhai Gigabhai, witness Husenbhai Abdullabhai and witness Bhupatbhai Ratilal.

20. The plea that there was inordinate delay in

holding T.I.Parade and, therefore, evidence led by the prosecution regarding identification of the appellants as assailants of the deceased by the witnesses should be excluded from consideration, has no merits. It is relevant to notice that after the incident, all the three appellants were absconding for a pretty long time. The appellant Nos.1 & 2 could be apprehended only on September 28, 2001, whereas the appellant No.3 was arrested on October 16, 2001. It is true that it would have been better if T.I.Parade had been held immediately within reasonable time of arrest of the appellant No.3. It is also true that witness Lakhabhai has stated in his evidence that the appellant No.3 was brought to the Office of Mamlatdar tied with rope and, therefore, at the best, identification by the said witness of the appellant No.3 may be doubtful. However, this frank statement made by witness Lakhabhai would not affect identification of the appellants by other witnesses at T.I.Parade. On the contrary, this statement made by witness Lakhabhai indicates that all the witnesses are witnesses of truth and they have refrained from telling lies. There is no manner of doubt that all possible precautions were taken by the investigation officer and the Mamlatdar that witness had no opportunity of seeing or meeting any of the appellants before holding of T.I.Parade and,

therefore, evidence adduced by the prosecution regarding identification of the appellants at T.I.parade will have to be accepted.

21. In **Bharat Singh v. State of U.P., A.I.R. 1972 SC 2478,** validity of identification parade was challenged on the ground of irregularity in the manner of holding it and also on the ground of undue delay in holding the same. While negativing the same, the Supreme Court has held that validity of identification parade cannot be challenged on the ground of irregularity in the manner of holding it, or on the ground of undue delay in holding it when the Magistrate, who held the parade and the police officer who conducted investigation, have not been cross-examined in that behalf. So far as this case is concerned, this Court finds that no questions were put to the Executive Magistrate Ms.Kalpanaben Padiya, or the investigating officer as to why delay in holding T.I.Parade had taken place. Under the circumstances, delay in holding T.I.parade by itself cannot be considered to be fatal to the evidence led by the prosecution regarding T.I.Parade.

21(1) Further, Ms.Liliben, in first information report, had clearly stated that she and the witnesses

named by her therein, had properly seen the miscreants and would be able to identify them if shown to them, and there was also evidence that the witnesses had taken up their positions near the deceased and were injured, and there was adequate light and opportunity to mark faces and features of miscreants. Therefore, the identification of the appellants at T.I.Parade could not be said to be unreliable at all. This is so, in view of decision of the Supreme Court in **Chander Singh v. State of U.P., AIR 1973 SC 1200.** Having regard to the facts of the case, the evidence led by the prosecution regarding identification of the appellants by the witnesses at T.I.parade cannot be excluded from consideration on the ground of delay in holding the same as is suggested by the learned counsel of the appellants.

22. Even if one were to agree with the contention advanced by the learned counsel of the appellants that the delay caused in holding T.I.Parade has affected evidentiary value of T.I.Parade, this Court notices that complicity of all the three appellants in the incident stands firmly established by the eye witness account of Salimbhai Husenbhai, which is discussed in detail earlier. As observed earlier, testimony of Salimbhai makes it very evident that the appellant Nos.1 & 3 had

assaulted the deceased with their knives, and after the incident was over, they had fled in the rickshaw driven by the appellant No.2. Therefore, notwithstanding the so-called delay in holding T.I.Parade, case against the appellants stands firmly established by reliable testimony of witness Salimbhai Husenbhai.

23. After noticing evidence relating to identification of the appellants at T.I.parade, as unfolded by the witnesses, it would be relevant to refer to circumstantial evidence produced by the prosecution in support of its case against the appellants. It is the case of the prosecution that at the time of arrest of the appellant No.1, clothes put on by him were found to be faintly stained with blood and were, therefore, seized. It is also the case of the prosecution that while in police custody, the appellant No.1 had made disclosure statement, pursuant to which, the knife used by him in commission of the offence was recovered and that the same was also faintly bloodstained. The prosecution has further approached the Court with the case that the appellant No.3 while in police custody had made voluntary disclosure statement, pursuant to which, knife with scabbard kept below dickey of Bike parked at an unused place for a long time, was recovered. Though the panch

witnesses examined by the prosecution have turned hostile, the fact that bloodstained clothes of the appellant No.1 were seized at the time of his arrest, and that pursuant to disclosure statements made by the appellant Nos.1 & 3, bloodstained knife used by the appellant No.1 and bloodstained scabbard in which the knife used by the appellant No.3 was kept, were recovered, stands firmly established by the testimony of the investigating officer.

24. The plea that panch witnesses have turned hostile and, therefore, the evidence adduced by the investigating officer regarding seizure of incriminating articles at the instance of the appellant Nos.1 & 3 should be disbelieved, is merely stated to be rejected. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It must be realised that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the

testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right of veto to the panchas so far as that question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by Court on the ground that he is a police officer. On the facts and in the circumstances of the case, this Court finds that testimony of P.S.I. Mr.Bhojani is not only inspiring confidence, but, gets corroboration from the other evidence on record. Therefore, the learned Judge of the trial Court was justified in believing the evidence adduced by the prosecution regarding seizure of bloodstained clothes put on by the appellant No.1 as well as recovery of bloodstained knife at his instance and bloodstained scabbard at the instance of the appellant No.3. The manner in which those incriminating articles were seized, is mentioned in detail in documents such as Exh. 79, Exh.83 and Exh.91. The evidence on record clinchingly establishes that incriminating articles seized during the course of investigation were sent to F.S.L for analysis. It is relevant to notice that the blood group of the appellant Nos.1 & 3 is `B', which is

quite evident from the evidence of Dr. Iftehar Haroon Hasan, recorded at Exh.61, whereas bloodstains on the clothes which were put on by the appellant No.1 were found to be of `O' group, which was the blood group of the deceased. Similarly, scabbard in which the knife was kept by the appellant No.3 was found stained with blood having `O' group, which was the blood-group of the deceased. Find of the same group of blood as that of the deceased on clothes of the appellant No.1 as well as weapons of offence recovered at the instance of the appellant Nos.1 & 3 would establish that they were in close proximity of the deceased when the deceased was fatally wounded and that those appellants had every opportunity of committing murder of the deceased.

25. On reappraisal of evidence on record, this Court finds that complicity of the appellants in the murder of the deceased stands firmly established. No ground is made out by the learned counsel of the appellants to interfere with the finding of facts recorded by the learned Judge in Para-65 of the impugned judgment. As this Court, on re-evaluation of evidence, agrees with the conclusions reached by the trial Court, the conviction of the appellants for commission of offences punishable under Sections 302, 324, 332 r.w.section 120B I.P.C. will have

to be upheld and is accordingly upheld. The conviction of the appellants recorded under Section 135 of the Bombay Police Act is not challenged by the learned counsel of the appellants at all. The same is found to be eminently just in view of testimony of witness Ramniklal Meghjibhai Vaja examined at Exh.119, who has produced notification issued by the competent authority under Section 37(1) of the Bombay Police Act. Therefore, well-founded conviction of the appellants under Section 135 of the Bombay Police Act is also hereby confirmed.

26. This brings the Court to consider as to whether death sentence imposed on the appellant Nos.1 & 3 deserves to be commuted to life imprisonment, as pleaded by the learned counsel of the appellants. As far as the quantum of sentence is concerned, this Court has given careful consideration in the light of the submissions made by the learned counsels of either side. As to what category a particular case would fall, depends invariably on varying facts of each case and no absolute rule for invariable application or yardsticks as a ready reckoner can be formulated. In **Panchhi and others v. State of U.P. (1998)7 SCC 177,** it has been held that the brutality of the manner in which the murder was perpetrated may not be the sole ground for judging whether the case is one of

the `rarest of rare cases' as indicated in **Bachan Singh v. State of Punjab, (1980)2 SCC 684** and that every murder being per se brutal, the distinguishing factors should really be the mitigating or aggravating features surrounding the murder. As per the principles laid down in the said case, the intensity of bitterness, which prevailed, and the escalation of simmering thoughts into a thirst for revenge or retaliation are also held to be relevant factors. In **Om Prakash v. State of Haryana, (1999)3 SCC 19,** dealing with a case of murder of seven persons, some totally innocent too, over a dispute relating to a small house in a village, the Supreme Court has observed that the particular and peculiar facts and circumstances of each case should be properly balanced. Noticing the mentally depressed condition of the accused, it was held in the said case that the case was not one of those rarest of rare cases where the lesser sentence of life imprisonment could not be said to be adequate, despite the fact that the accused was guilty of committing a gruesome act of a premeditated and well thought out murder. While striking a contrast with such of those cases where the extreme punishment of death is warranted, it was also observed that the one dealt with therein was neither a crime committed because of lust for wealth or women (neither

for money such as extortion, dacoity or robbery nor even for lust and rape) or an anti-social act involving kidnapping and trafficking in minor girls or of an anti-social element dealing in dangerous drugs which affects the entire moral fibre of the society and kills a number of persons nor was committed for power or political ambitions or as part of organized criminal activities. In **Vashram Narshibhai Rajapara vs. State of Gujarat, AIR 2002 SC 2211** despite appellant's economic condition and earnest attempt to purchase a house for family after raising loans, wife and daughters were stated to be not pleased and were engaging in quarrels constantly with the appellant and though they were all living together, continuous harassment and constant nagging affected mental balance of the appellant and such sustained provocation reached a boiling point resulting in causing death of his wife and four daughters. The Sessions Court imposed punishment of death. That was upheld by the High Court. It was noticed by the Supreme Court that the appellant though hailing from a poor family, had no criminal background and it was possible to get him rehabilitated because it could not be established that he was a menace to the society. Under the circumstances, the Supreme Court partly allowed the appeal and modified sentence of death into one of R.I.

for life. There is no manner of doubt that power of a Judge to determine appropriate sentence is based on the principle of proportionality so that punishment fits with the crime. However, the mitigating circumstances cannot be overlooked by the Court. As per the testimony of the complainant, the deceased was involved in murder of relatives of the appellants and, therefore, the appellants were waiting to take revenge for murder of their relative. The record of the case shows that the appellants were under mental and emotional disturbance and, therefore, had committed murder of the deceased. In **Vinayak Shivajirao Pol v. State of Maharashtra, (1998)2 SCC 233**, the accused suspecting fidelity of his wife killed her by strangulation. He cut off her head and thumbs. He threw the headless trunk and the head in two different wells and the thumbs at another place. Such a case was not held a rarest of rare case by the Supreme Court and, therefore, sentence of death awarded by the High Court was reduced to one of imprisonment for life. The principles governing imposition of death sentence have been laid down by the Supreme Court in **(1) Lehna v. State of Haryana, (2002)3 SCC 76, (2) Sardar Khan v. State of Karnataka, (2004)2 SCC 442, and (3) Simon and others v. State of Karnataka, (2004)2 SCC 694**. According to

the Supreme Court, imposition of death sentence would be justified if facts are such that to award any punishment less than death sentence would shock the conscience of the Court and would be a mockery of justice. What is ruled by the Supreme Court in the above quoted decisions is that nature of the crime and the accused should be considered, and aggravating as well as mitigating circumstances should be weighed in the context of facts and circumstances of the case before imposing death sentence. The contention that the appellant No.3, while on furlough, had hatched a conspiracy to kill the deceased and in fact, participated in murder of the deceased, as a result of which death sentence imposed on him should be confirmed by this Court, has no substance. In **Krishan v. State of Haryana, A.I.R. 1997 SC 2598,** the accused was already serving sentence of life imprisonment. He was found guilty of committing another murder while he was released on parole. Felonious propensity of offender was made sole basis for awarding death sentence. On review of the facts, the Supreme Court has held that felonious propensity of offender cannot be made sole basis for awarding death sentence, and as it was found that case was not falling into category of `rarest of rare cases', death sentence was commuted to one of life imprisonment. Having regard to the principles

laid down by the Supreme Court in several reported decisions, this Court is of the opinion that death sentence imposed on the appellant Nos.1 & 3 deserves to be commuted to one of life imprisonment. However, there is no manner of doubt that the appellant No.3, while on furlough leave, had hatched a conspiracy to kill the deceased and, in fact, participated in murder of the deceased and, therefore, it would be in the fitness of things to direct that he shall undergo life imprisonment in this case, after he undergoes sentence of life imprisonment imposed on him in earlier case.

For the foregoing reasons, Confirmation Case No.6 of 2004 is dismissed. Criminal Appeal No.1497 of 2004 is hereby partly allowed. The conviction of each of the appellants under Sections 302, 324, 332 read with Section 120B I.P.C. and Section 135 of the Bombay Police Act is hereby confirmed. However, sentence of death imposed on the appellant Nos. 1 & 3 for commission of murder of deceased Taiyabbhai is hereby modified into one of R.I. for life. All the appellants are sentenced to life imprisonment for commission of offence punishable under Section 302 r.w.Section 120B I.P.C. and fine of Rs.1,10,000/- each, in default, R.I. for two years. It is directed that out of the amount of fine of Rs.1,10,000/-,

each appellant shall pay Rupees One Lakh to the wife of the deceased as compensation as contemplated by Section 357 of the Code of Criminal Procedure, 1973. For commission of offence punishable under Section 324 r.w.section 120B I.P.C., each appellant is sentenced to suffer R.I. for one year and fine of Rs. 10,000/-, in default, R.I. for two months. For commission of offence punishable under Section 332 r.w.Section 120B I.P.C, each appellant is sentenced to R.I. for one year and fine of Rs.10,000/-, in default, R.I. for two months.

The jail-remarks-sheet of the appellant No.3 produced for perusal of the Court indicates that he is convicted for commission of offence punishable under Section 302 r.w.Section 34 I.P.C. in Sessions Case No.8 of 1994 vide judgment dated October 14, 1998 and sentenced to suffer R.I. for life. The appellant No.3 shall undergo life imprisonment imposed in this case, after he undergoes sentence of life imprisonment imposed on him in Sessions Case No.8 of 1994. No separate sentence is imposed on any of the appellants for commission of offence punishable under Section 135 of the Bombay Police Act. It is further directed that the substantive sentences imposed on the appellants shall run concurrently. Criminal Appeal No.1497 of 2004 filed by the appellants is partly allowed to the extent indicated

hereinabove. Muddamal to be disposed to in terms of directions given by the learned Judge in the impugned judgment.

[J.M.PANCHAL,J.]

[H.B.ANTANI, J.]

(patel)